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No. 95-527

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HAROLD HUGULEY; GLENN V. SMITH; and LEE WHITFIELD,
Petitioners,
vs.
THE STATE OF COLORADO; THE HONORABLE ROY ROMER, Governor of the State of Colorado; THE COLORADO DEPARTMENT OF ADMINISTRATION; and FORREST M. CASON, Executive Director of the Department of Administration,
Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of the State of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in holding that the State of Colorado may permit an historical monument commemorating the Ten Commandments to remain along with many other historical artifacts in a park on the State Capitol grounds without violating the Establishment Clause?

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STATEMENT OF THE CASE

Respondents perceive the following misstatements of fact in the petition. *See* Rule 15.2, Rules of the Supreme Court of the United States (Oct. 2, 1995).

The petition's description of the face of the monument (Pet. at 2) omits some of the symbols that the court

below concluded were reflective of religious diversity as well as secularism, ultimately contributing to the monument's consistency with the "melange of historical commemorative accounts" and "rich cultural diversity" that make up the setting. Pet. App. E24-25.

The petition at 2 states that the monument's text includes an "exhortation"; the court below did not find these words constituted exhortation.

The petition at 3 states "There are a number of similar monuments located on public grounds around the United States"; the court below found that monuments were donated to "several local and state governments, including Colorado" with no indication that any such monuments are currently extant elsewhere. Pet. App. E9.

The petition states that the monument was "part of a nationwide campaign to instill the principles of God's message to Moses in youngsters." Pet. at 3. However, the court below found that based on a belief that youngsters were "without any code of conduct or standards by which to govern their actions," a juvenile court judge thought "they could benefit from exposure to one of mankind's earliest codes of conduct," to demonstrate that there were long "recognized codes of behavior to guide and help them"; this program "was not to be a religious instruction of any kind." Pet. App. E8.

The petition at 5 states that the monument is "maintained by the State"; the court below found that "The State does not allocate funds to maintain the monument." Pet. App. E9. There was also testimony that if the monument were in need of repair the State would have recourse to the Eagles. R. vol. 3, p. 69, ll. 8-11.

The petition states that the court below decided that the setting "secularizes the monument." Pet. at 5. However, the court below held "[T]he monument's content and its setting among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds sufficiently neutralize its religious character resulting in neither an endorsement nor a disapproval of religion." Pet. App. E12.

The petition at 6 states that "There is nothing in the immediate vicinity of the Ten Commandments monument," and that none of the other objects have any relevance to the Ten Commandments monument; in fact, the court below held precisely to the contrary. Pet. App. E23-24.

REASONS FOR DENYING THE WRIT

Introduction

In a highly fact-bound and narrow decision the opinion below closely followed the dictates of this Court in its Establishment Clause jurisprudence. The Colorado Supreme Court not only did not contradict any principle previously enunciated by this Court, but it in fact tied its holdings at every step of the way to principles previously enunciated by this Court.

The petition is replete with incorrect generalizations. For instance:

> This ruling has no foundation in law or fact and must not be allowed to stand. It is in direct conflict with this Court's decisions in *Allegheny County* and *Stone*, and with the de-

cision of the United States Court of Appeals for the Eleventh Circuit in *Harvey*.

Pet. at 5 (citations omitted). However, upon examination these statements do little more than assume a conclusion. The petition provides little, if any, specification as to exactly how the Colorado ruling is in conflict with the cited cases, except by way of the most superficial and ultimately misleading statements.

The petition meets none of the requirements specified in Rule 10, Rules of the Supreme Court of the United States (Oct. 2, 1995). Specifically, the Colorado Supreme Court has not "decided an important federal question in a way that conflicts with the decision of any other state court of last resort or of a United States court of appeals"; nor has it "decided an important question of federal law that has not been, but should be, settled by this Court"; nor has it "decided an important federal question in a way that conflicts with relevant decisions of this Court." At best, the petition is predicated upon erroneous factual findings, or the misapplication of a properly stated rule of law.

I. THE OPINION BELOW IS MERELY AN APPLICATION OF THE SETTLED LAW OF THIS COURT.

With only rare exception, this Court has applied the three tests developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to Establishment Clause cases. The tests are: that the governmental activity have a secular purpose; that its principal or primary effect be one that neither advances nor inhibits religion; and that it not foster an excessive government entanglement with religion. 403 U.S. at 612-13. The leading cases applying the *Lemon* tests to government

display of objects with religious significance are *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989). The opinion below is fully consistent with both *Lynch* and *Allegheny County*.

A. The Opinion Below is Consistent with *Lynch*.

Three of the principal teachings of *Lynch* are particularly relevant to the instant case: first, governmental action that constitutes acknowledgment of this country's religious heritage does not violate the Establishment Clause; second, courts may not use an "absolutist approach" in Establishment Clause analysis; and third, the *Lemon* test should be applied using the concept of the reasonable observer. The opinion below correctly employs each of these three teachings of *Lynch*.

1. Acknowledgment of Religious Heritage

This Court's opinion in *Lynch* surveyed the numerous historical and commonplace ways in which government acknowledges this country's religious heritage. The Court said:

> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.

465 U.S. at 674. The Court then chronicled numerous "examples of reference to our religious heritage" in

governmental actions, including the employment of legislative chaplains with public funds; allowing public school children to be released from classes to attend religious exercises; national holidays such as Thanksgiving and Christmas which had their genesis as solely religious observances; the statutorily prescribed national motto of "In God We Trust" which appears on our currency; and the display of works of art with religious themes in public art galleries. The Court then noted that "There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Id.* at 677. It found inescapable the conclusion that "our history is pervaded by expressions of religious beliefs." *Id.* The Court held that each of these acknowledgments is permissible under the Establishment Clause.

The opinion below closely tracks this holding of *Lynch*: the presence of the Ten Commandments monument amidst various other symbols of our culture and history is a permissible acknowledgment of our religious heritage, and even more, of our respect as a people for the rule of law.[1]

The opinion below repeatedly reiterates and approves the trial court's conclusion that the Ten Commandments monument is one of a number of monuments which "overall contain symbols of various historic events or concepts

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[1] For instance, the opinion recounts the eloquent testimony of one witness that the monument could be seen as "a monument to the fact that we as a republic are a people who pay attention to law." Pet. App. E23 n.17.

associated with American history." Pet. App. E11. The Colorado Supreme Court concluded that:

> The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado. . . . This collection of monuments . . . [is] an acknowledgment of the cultural tapestry that is Colorado.

Pet. App. E24. These findings do no more than mirror the sort of acknowledgment of our religious heritage that *Lynch* found permissible.

2. Non-Absolutist Approach

The second teaching of *Lynch* is that Establishment Clause analysis should not be "absolutist." Without using the term itself, the petition argues for the absolutist approach that *Lynch* rejected, focusing exclusively on the religious aspects of the monument and ignoring its setting as one of many artifacts of American and Colorado history present in the Capitol Complex Grounds.

The petition alleges that the opinion below is "in direct conflict" with the holding in *Stone* solely because that case found that the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths." Pet. at 5, 7. In other words, petitioners maintain that the religious component of the Ten Commandments makes their display *per se* unconstitutional. This is not a holding of *Stone*, nor is it a principle this Court has enunciated elsewhere.

To the contrary, the *Lynch* Court recounted the ubiquity of official acknowledgment of our religious heritage throughout this country's history, and then noted:

> This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause . . . .
>
> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith -- as an absolutist approach would dictate -- the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

465 U.S. at 678.[2]

The Colorado Supreme Court correctly followed the non-absolutist approach of *Lynch*, noting:

> While the text of the Ten Commandments affixed to a monument would not be appropriately placed on state property *standing alone*, here the Ten Commandments monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park.

Pet. App. E24-25 (emphasis in original).

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[2] *See also id.* at 680 ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.").

The court below stated it would not automatically impute a religious purpose or effect to every government action that in some way implicated religion; it instead applied the correct constitutional standard. "[A]ny religious meaning of legal consequence must ultimately flow from the character of the state action as perceived by an objective observer, but does not turn on whether the message, though secular, also has religious value." Pet. App. E26.

Applying the *Lynch* analysis overall to the instant case, the evident purpose of including the Ten Commandments monument in the larger display of the Capitol Complex Grounds was not promotion of its religious content, but celebration of our country's heritage through display of one of the traditional historic origins of Western Civilization:

> The record does reflect, however, through the testimony of several state employees, that the State's purpose in accepting any monuments in that park is not to endorse the message depicted in the various monuments, but rather to open the public park up to all different types of groups interested in utilizing the valuable state grounds.

Pet. App. E23.[3] Such a celebration is a legitimate secular

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[3] Contrary to the petitioners' argument (Pet. at 6-7), this Court has never said that the Ten Commandments may be afforded public recognition only in the context of *legal* traditions or *legal* history. *See, e.g., Lynch*, 465 U.S. at 677 ("notable and permanent" depiction of Moses with the Ten Commandments in courtroom); and *Stone*, 449 U.S. at 42 (Ten Commandments and the Bible "may be constitutionally used in an appropriate study of history, civilization, ethics, comparative religion, or the like") (continued...)

purpose, even if the symbol itself also has religious aspects. Pursuant to *Lynch*, the court below correctly focused on the State's overall purpose in landscaping the Capitol Complex Grounds and the consequent effect of non-endorsement, not the inclusion of the Ten Commandments alone.

3. Reasonable Observer Standard

The *Lynch* opinion makes clear that the belief of *some* observers that a government's display constitutes an endorsement of religion does not lead to an invalidation of the conduct under the *Lemon* test. The *Lynch* majority rejected the dissent's assertion that a display becomes unconstitutional if "some observers . . . perceive that the City has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion." 465 U.S. at 683. The concurrence of Justice O'Connor seconds this notion, adding that the perspective of the reasonable observer should be the proper focus of the inquiry. *See also id.* at 688 (a display makes adherence to a religion relevant to a person's standing in the political community if it "sends a message to nonadherents that they are . . . not full members of the political community, and an accompanying message to adherents that they are . . . favored members of the political community") (O'Connor, J., concurring).

The standard articulated by Justice O'Connor is not what *any* viewer, but what a *reasonable* viewer would believe or perceive. The concurrence focuses on "what viewers may *fairly understand* to be the purpose of the display." 465 U.S. at 692-93. What a reasonable observer

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[3](...continued)
(citing *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963)).

would perceive is in turn dependent on the setting or context in which the display appears.

It is clear that not all observers may be reasonable or neutral viewers who "fairly understand" the purpose and effect of a display. For instance, testimony in the instant case indicated that some had protested the existence of a Civil War monument on the Capitol Complex Grounds; others who are pacifists might disagree that symbols of U.S. military history should be displayed. Similarly, Petitioners focus upon the religious nature of the Ten Commandments.

The Colorado Supreme Court, however, followed *Lynch* and correctly inferred it could be "fairly understood" that in light of the purpose of the overall display, and in the context of the Capitol Complex Grounds, the Ten Commandments monument does not send a message of government endorsement of religion. Given the surrounding monuments even "in the immediate vicinity" (Pet. App. E23) of the Ten Commandments monument, let alone in the Capitol Complex Grounds as a whole, "In essence, the monument is found in what is much like a museum setting which, 'though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.'" Pet. App. E24.[4]

Similar to the "history and ubiquity" that Justice O'Connor associated with the *Lynch* display, the testimony of record throughout this case shows that Americans in

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[4] The opinion below thus correctly summarized the reasonable observer approach: "The message the object conveys in context is also significant in a determination of whether the display has the effect of endorsing religion, because the context may affect the message a reasonable observer would derive from the setting." Pet. App. E23.

general regard the Ten Commandments as not only religious doctrine associated with Christianity and Judaism, they view them in a generic sense as being synonymous with the rule of law and with the roots of American jurisprudence. *See* Pet. App. E10 ("[T]he Ten Commandments are the basis for many of our secular laws.") *See also* Pet. App. E22 ("[T]he historical fact [is that] the Ten Commandments has served over time as a basis for our national law."). *Accord Lynch*, 465 U.S. at 691 (permissible secular objectives described as "instilling most of the values of the Ten Commandments and illustrating their connection to our legal system.").

While some would not have it so, the Ten Commandments have a distinct "history and ubiquity" in American culture. They have become part of the warp and woof of Western civilization in general and of American civilization in particular. As the court below found, as displayed in this setting the Ten Commandments monument constitutes no more than a "recognition of a historical, jurisprudential cornerstone of American legal significance." Pet. App. E27.

B. The Decision Below is Consistent with *Allegheny County*.

The decision below is completely consistent with *Allegheny County*, in which this Court decided the constitutionality of two separate displays, one a creche, the other a menorah.[5] The discussion of *Allegheny County* in the petition consists almost solely of the statement that since the creche and the menorah were "treated as separate displays" in *Allegheny County*, the Ten Commandments monument in

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[5] The *Allegheny County* analysis, however, must be employed with care, since only a portion of the decision represents the opinion of a majority of the Court.

the instant case must be separated from all the other monuments on the Capitol Complex Grounds. Pet. at 6. This, of course, ignores the fact that there was no question but that the two displays in *Allegheny County* were separate, and there was no finding or even allegation to the contrary referenced in the opinion of the Court. In the instant case, the trial court as finder of fact heard evidence from both sides, including the petitioners' allegation that this one monument somehow stood alone, unlike all the other monuments on the Capitol Complex Grounds. That court nonetheless made the determination that the subject monument was not separate from all its counterparts, a finding that was merely affirmed by the Colorado Supreme Court.

The opinion of the Court in *Allegheny County* draws much support from both the *Lynch* majority and Justice O'Connor's concurrence therein. It affirms the three principles of *Lynch* discussed above. First, the Court acknowledged the rich and pluralistic religious tradition that is this country's heritage. "This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American continent." 492 U.S. at 589. It went on to affirm that government may acknowledge the cultural aspects of a religious object or event. *Id.* at 601.

Second, *Allegheny County* rejected the absolutist approach that would disallow any display of a religious object purely because the object has such an aspect, i.e., focusing exclusively on the object's religious aspect and disregarding its surrounding context or setting. *Allegheny County* notes that while an object such as a creche is certainly capable of communicating a religious message, for purposes of its constitutionality the effect of the display in actuality "turns on its setting." 492 U.S. at 598. The Court compared the creche display to the permissible display in

Lynch, and concluded that "in this context" the display was impermissible. 492 U.S. at 602. The Court stated that its endorsement inquiry "examines the particular contexts in which the government employs religious symbols." *Id.* at 606. "[T]here is no hiding behind the fiction that *Lynch* decides the constitutionality of every possible government creche display." *Id.* at 609 n.57.

Third, the *Allegheny County* opinion utilized the reasonable observer approach which prohibits "making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 594, quoting *Lynch*, 465 U.S. at 687. "The effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display,'" which "of necessity, turns upon the context in which the contested object appears." The Court reiterated the *Lynch* observation that a museum setting negates any message of endorsement of religious content. 492 U.S. at 595.[6]

Allegheny County then employed these principles to closely examine the context of the creche, finding the display to be impermissible. With respect to the creche, the opinion of the Court turned on the conclusion that the government was sending an "unmistakably clear" religious message of support and praise to a Christian God for the birth of Jesus, with "[N]othing in the context of the display [to] detract

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[6] *See also* 492 U.S. at 597 ("[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context," noting that these principles have been adopted and utilized by the Court in cases subsequent to *Lynch*). (Blackmun, J., joined by Stevens, J., concurring.)

from [this] religious message." 492 U.S. at 598, 600. *See also id.* at 601-02 ("[The county] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause.").

Thus, *Allegheny County* supports the decision below. Here, there is *no* message appended to the Ten Commandments monument, such as "Glory to God in the Highest for having given us this code of religious conduct." The monument bears no banner or other indication that the State or anyone else is praising God for the giving of the Commandments; the State is thus not sending an "unmistakable message of support and promotion of Christian praise to God," or "suggesting that people praise God for" the Commandments. Instead, to a reasonable observer, in its context of the Capitol Complex Grounds, the Ten Commandments monument is like all the other monuments contained therein: the State is acknowledging the Commandments as a cultural phenomenon and part of our American heritage and history, along with the numerous other such displays found there.

Finally, there is a striking parallel between the *Allegheny County* Court's description of the permissible creche in *Lynch* and the Colorado Supreme Court's description of the Ten Commandments monument. In *Allegheny County* the Court said:

> Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. . . . [T]here were objects of attention separate from the

> creche [having] their specific visual story to tell. . . . Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.

492 U.S. at 598.

In the instant case, the court below "reiterated in detail the evidence in the record and the facts derived at trial" (Pet. App. E4-6), concluding that:

> As the trial court found, the Ten Commandments monument in this case does not stand alone and is not a conspicuous feature of Lincoln Park. In the immediate vicinity . . . are both the much larger Martinez Statue and the larger drinking fountain monument; secular monuments similar to those are also found throughout the Capitol Complex Grounds. . . .

Pet. App. E23-24. *See also* Pet. App. E24 ("The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado. . . . This collection of monuments celebrates a history of standing up against oppression, foreign and domestic, and an acknowledgment of the cultural tapestry that is Colorado."). This conclusion is based on a multitude of evidence of record and stands in sharp contrast to the allegation that the Ten Commandments monument "stands by itself." Pet. at 6.

Therefore, similar to the creche in *Lynch*, and unlike the creche in *Allegheny County*, the display comprises a series of objects in the Capitol Complex Grounds or even in

only Lincoln Park itself. There are objects of attention separate from the monument, each with its own focal point, secular symbols with visual stories to tell, and the Ten Commandments monument cannot be characterized as the single element of the display.

II. THE DECISION BELOW IS CONSISTENT WITH THE HOLDINGS IN *STONE* AND *HARVEY*.

The petitioners misread *Stone v. Graham*, 449 U.S. 39 (1980) and *Harvey v. Cobb County, Ga.*, 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd mem.*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 114 S. Ct. 2138 (1994). The opinion below is not inconsistent with the holdings in either of these cases.

A. The Decision Below Does Not Conflict with *Stone*.

The petition alleges that because the Ten Commandments were found to be a sacred text in *Stone*, the opinion below is in conflict with *Stone*. Pet. at 5, 7. *Stone* has little if any relevance to the instant case. However, the fact that the petitioners believe it directly conflicts with the opinion below and is controlling reveals an incorrect understanding of the holding in *Stone*.

First, the petition's reliance on *Stone* ignores this Court's injunction that school setting cases constitute a distinct and specialized area of Establishment Clause law, and are not indiscriminately applicable to display cases outside the school setting. *Edwards v. Aguillard*, 482 U.S. 578, 583-85 (1987) (citing *Stone*). This Court has made clear that when it is dealing with displays in non-school

locations, its touchstones are the analyses in *Lynch* and *Allegheny County*; conversely, but equally clearly, the Court's analysis in school setting cases like *Stone* is specialized and particularized to that context. The *Stone* opinion itself underscored the Court's unique school-setting analysis, in that every case cited, other than *Lemon*, is a school setting case.

In *Stone* this Court stated that school setting cases constitute a distinct and specialized area of Establishment Clause law, and are not indiscriminately applicable to display cases outside the school setting. *Accord Allegheny County*, 492 U.S. at 594 (rejecting the applicability of *Stone* and noting "Closer to the facts of this litigation is *Lynch*."). In *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Court affirmed its special *Edwards* approach for school cases, noting its "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 112 S. Ct. at 2658. In *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985), Justice O'Connor, concurring, said that what is permissible in the non-school setting is not dispositive of what is permissible in the school setting. Her statement obviously implies the converse as well: what is impermissible in the school setting is not dispositive of what is impermissible in the non-school setting.

Next, *Stone* is in no way analogous or even relevant to the instant case. First, *Stone*, in fact, concerned the constitutionality of a Kentucky statute; second, the holding turned on the government's impermissible *purpose* in enacting the statute; and third, the holding was firmly based in its school setting. In contrast, in the instant case the placement of the monument has no genesis in a statute; petitioners do not appear to allege that the State's purpose is

unconstitutional; and the Colorado monument is not located in a school setting.

Stone is simply a brief per curiam opinion in which, based on the particular facts presented therein, this Court found that the State violated the first part of the *Lemon* test because the challenged legislation had no secular legislative purpose. 449 U.S. at 41. Rather, the government's *sole purpose* in enacting a law requiring display of the Commandments on school walls was religious, and therefore the statute was unconstitutional. *Id.* at 41. From this simple and limited holding, petitioners would engraft a much expanded principle that since the *Stone* Court stated that the Ten Commandments were a text sacred in the Jewish and Christian faiths, they may not constitutionally be displayed.

The *Stone* opinion further noted that the Ten Commandments were not integrated into the school curriculum, and drew the following central conclusion:

> Posting of religious texts on the wall *serves no such educational function*. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. [This is] *not a permissible state objective* under the Establishment Clause.

449 U.S. at 42 (emphasis added).

As has been discussed, in sharp contrast, the Ten Commandments monument in this case serves a number of predominant secular objectives.

B. The Opinion Below Does Not Conflict with *Harvey*.

The petition states that the opinion below is in direct conflict with the decision of the Court of Appeals for the Eleventh Circuit in *Harvey* because a display of the Ten Commandments was found unconstitutional therein. Pet. at 5, 8. Such a conclusion totally ignores the clear mandate of this Court that each display must be considered in its particular context and setting, as has been discussed.

Also, although the opinion of the U.S. District Court for the Northern District of Georgia was affirmed without opinion by the Court of Appeals for the Eleventh Circuit and this Court denied certiorari, this Court's denial of certiorari does not confer precedential value on the merits of a lower court decision. *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363, 365 n.1 (1973). Even so, the opinions do not conflict: given the significant factual differences in the two cases, they are fully consistent.

First, the central and controlling factual difference in the cases is that in *Harvey* the trial court as the finder of fact found that the framed panel was the *only* element of the display's setting. "[T]he display stands alone in the alcove, and there are no countervailing secular passages or symbols." 811 F. Supp. at 678.

This is a far cry from the record in the instant case. While the petitioners argued to the trial court that the Ten Commandments monument was isolated, that it stood alone and apart from the other monuments and tributes in Lincoln Park, the trial court disagreed. The Colorado Supreme Court affirmed the trial court's factual finding that the monument is "displayed among other monuments and tributes on the grounds of the State Capitol" Pet. App. E3;

it is set "among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds" Pet. App. E12. "As the trial court found, the Ten Commandments monument in this case does not stand alone and is not a conspicuous feature of Lincoln Park. In the immediate vicinity . . . are both the much larger Martinez Statue and the larger drinking fountain monument; secular monuments similar to those are also found throughout the Capitol Complex Grounds . . . ." Pet. App. E23-24; [there is a] "collection of monuments . . . an acknowledgement of the cultural tapestry that is Colorado. . . . [and a] melange of historical commemorative accounts found in Lincoln Park." Pet. App. E24-25.

The second significant and controlling factual difference in the cases was in the explicitly religious nature of the content of the Georgia panel: the Georgia court emphasized that the framed panel contained *both* the Ten Commandments and what is known as the "Great Commandment," which is explicitly attributed to Jesus of Nazareth.[7] It was this inclusion that led the Georgia trial court to find that, "[T]he Great Commandment . . . emphasizes the religious nature of the panel and its association with the Christian tradition." 811 F. Supp. at 677.

In the instant case, the Colorado Supreme Court affirmed the trial court's finding that the version of the Ten Commandments on the monument "was not identified with any particular religious group" Pet. App. E8; "The monument at issue here does not reproduce exactly the Ten Commandments as accepted by any particular sect." Pet. App. E21. The Colorado Supreme Court also found that the

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[7] "Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind; [and] Thou shalt love thy neighbor as thy self." 811 F. Supp. at 677.

face of the monument itself contained a "countervailing secular text" (Pet. App. E24) because its many secular and patriotic symbols (Pet. App. E21) created a "melange of civil, political, cultural, and religious meanings." Pet. App. E11 and E24-25. Also unlike the Georgia display, the Colorado monument itself contains a clear indication that it was not a creation of the State, but presented by the Fraternal Order of Eagles.

These significant factual differences naturally lead to different results. The Georgia court stated: "The Court concludes that the panel, when considered in its context, has the effect of endorsing religion in general and Christianity in particular and therefore violates the Establishment Clause." 811 F. Supp. at 678. The Colorado Supreme Court stated: "We find that, considering the monument and its placement in the park as well as the proximity of other monuments, the Ten Commandments monument is not isolated and, as displayed in Lincoln Park, does not convey a primarily religious message." Pet. App. E26.

The Georgia court's holding turned on the context of the display; similar to the creche in *Allegheny*, "Here, too, the display stands alone in the alcove, and there are no countervailing secular passages or symbols." 811 F. Supp. at 678. Such a description is unlike the setting of the Ten Commandments monument reviewed by the Colorado Supreme Court: "While the text of the Ten Commandments affixed to a monument would not be appropriately placed on state property *standing alone*, here the Ten Commandments monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park." Pet. App. E24-25 (emphasis in original).

Finally, the consistency of the opinions is highlighted by the remedy specified in *Harvey*. The *Harvey* Court

stayed its order requiring removal of the panel to give the County, "an opportunity to include the panel in a larger display of non-religious, historical items, which may bring it within constitutional parameters." 811 F. Supp. at 671. This is precisely the current state of affairs with respect to the Colorado monument as found by both the trial court and the Colorado Supreme Court, i.e., the monument is part of a larger display of non-religious historical items. The remedy proposed by the *Harvey* Court describes the conclusion reached by the Colorado court concerning the monument as it currently exists in Colorado.

III. THE INSTANT CASE TURNS ON FACTUAL DETERMINATIONS MADE BY THE TRIAL COURT AND AFFIRMED BY THE COLORADO SUPREME COURT; THE OPINION ESTABLISHES NO NEW PRINCIPLES OF LAW, IS LIMITED AND FACT-BOUND, AND IS NOT OF GENERAL IMPORTANCE OR APPLICABILITY.

This Court has said that Establishment Clause cases require courts to engage in careful scrutiny of challenged government practices. There is no question but that such scrutiny is highly fact-specific and context-specific. Analysis must be done on an individualized basis, applying the principles enunciated by this Court. In the instant case, the issue of what a reasonable observer may fairly understand to be the message of the monument, as presented in its particular physical setting, is central. This determination must, in the first instance, be firmly grounded in a trial court's factual determinations. This Court has characterized its "endorsement formulation" as "fact-intensive." *Allegheny County*, 492 U.S. at 608.

This Court has made the precept of the individualized nature of each Establishment Clause inquiry clear in both *Lynch* and *Allegheny County*.

> In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed. . . . The line between permissible relationships and those barred by the [Establishment Clause is not] straight and unwavering. . . . The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lynch, 465 U.S. at 678-79 (quoting *Lemon*, 403 U.S. at 614). *See also id.* at 692-94 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.").

Allegheny County reiterated the standards set out in *Lynch*.

> [O]ur present task is to determine whether the display of the creche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs. . . . Under the Court's holding in *Lynch*, the effect of a creche display turns on its setting. . . .

492 U.S. at 597-98. Further, the Court stated that its endorsement inquiry "examines the particular contexts in which the government employs religious symbols," *id.* at 606, acknowledging "the inevitably fact-specific nature of the question whether a particular governmental practice signals

the government's unconstitutional preference for a specific religious faith." *Id.* at 607-08. "[T]he effect of the government's use of religious symbolism depends upon its context." *Id.* at 597.

In this case, the determination of the context or setting in which the display is located and against which its constitutionality must be judged is a pivotal finding of fact that is central to subsequent legal analysis of constitutionality. The trial court heard extensive testimony and also, at the request of petitioners, personally viewed the monument and its setting and context. Based on a wealth of evidence of record, the trial court determined the "particular facts" of this matter. Pet. App. L4. It found that from "a view overall of its setting" and "as presented in its surroundings" (Pet. App. L10), the monument was one of "a number of monuments"; "there are many monuments on the state capitol grounds." Pet. App. L6. The court acknowledged the inconspicuous nature of the monument, noting that though the judge had passed by it "scores of time on foot," he could not identify its location until requested to visit it by the petitioners. Pet. App. L6.[8] The finder of fact thus rejected the petitioners' allegation that the monument stood alone or was somehow isolated from its counterparts.

The Colorado Supreme Court was similarly well-aware of the fact-based foundation necessary to proper legal analysis in Establishment Clause display cases. Throughout

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[8] Prior to this litigation, the monument in question has stood unchallenged and indeed largely unnoticed for over 30 years; similar to the creche in *Lynch*, its existence has been "marked by no apparent dissension." 465 U.S. at 684. Even one of the petitioners himself testified that he may have seen the monument previously, but did not know what it was because there were a lot of monuments there. R. vol. 2, p. 36, ll. 8-14.

the opinion it is clear that the court was fully mindful of this principle. For instance, at the very start of its opinion, the court noted that its conclusion was drawn "under the facts of this case." Pet. App. E3. This perspective was then further emphasized:

> [T]he evidentiary facts presented to the trial court . . . are essential to a complete understanding of this case. Therefore, we reiterate in detail the evidence in the record and the facts derived at trial.

Pet. App. E4. An examination of the text of the findings themselves emphasizes the specific fact-bound and narrow character of the holding, *e.g.*, "on the record before us". Pet. App. E25.[9]

The opinion below establishes no new principles of Establishment Clause law. Rather, it closely follows and applies the principles well-established in this Court's jurisprudence. Repeatedly throughout the opinion, the court below sought guidance from this Court's previous decisions, having frequent recourse to the exact words of *Lynch* and *Allegheny County*. For instance, the opinion below cites to

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[9] *See also* Pet. App. E25-26: "Establishment Clause cases require highly fact specific scrutiny which must be approached on a case-by-case basis. . . . The controlling question in this case is what a reasonable observer might fairly understand to be the primary message of the monument, *as displayed in its particular setting*. We find that, considering the monument and its placement in the park as well as the proximity of other monuments, the Ten Commandments monument is not isolated and, *as displayed in Lincoln Park*, does not convey a primarily religious message. . . . *[U]nder the particular circumstances before us today* . . . ." (Emphasis added.)

Allegheny County's utilization of the *Lynch* standard that "the effect of the government's use of religious symbolism depends upon its context." Pet. App. E17. Citing *Allegheny County*, 492 U.S. at 595, the opinion states:

> [T]he constitutionality of the Ten Commandments monument in this case will depend upon whether the display has the purpose or effect of endorsing or disapproving of religion. Resolution of that issue will rest in large part on the particular content and physical setting of the monument.

Pet. App. E21.

The opinion again mirrors *Allegheny County* as follows:

> The message the object conveys in context is also significant in a determination of whether the display has the effect of endorsing religion, because the context may affect the message a reasonable observer would derive from the setting.

Pet. App. E23.

After an exhaustive review of the evidence of record, and of the legal standards set out in *Lynch* and *Allegheny County*, the Colorado Supreme Court made its findings. The opinion repeatedly stresses that it is "applying the legal standard set forth in *Lemon* as modified by *Allegheny County*." Pet. App. E27.[10] The opinion below specifies that

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[10] *See also* Pet. App. E26 ("[A]pplying the objective observer test under the particular circumstances before us today.").

"after applying that test to the undisputed evidence and the findings set forth by the trial court," the trial court's conclusion of constitutionality was correct.

Petitioners argue that the court below erred in determining the context or setting of the monument, *i.e.*, that it is only one of many monuments comprising the Capitol Complex Grounds; they instead substitute their own determination that the monument is "isolated."[11] However, this dispute itself merely serves to point up the limited and fact-bound nature of the decision. The opinion below deals solely with the monument's very particularized setting in Colorado, establishes no new general principles of law. To the contrary, throughout its opinion the Colorado Supreme Court continuously has reference to the landmark decisions of this Court in *Lynch* and *Allegheny County*, and the legal principles enunciated in those cases.

While similar monuments may or may not exist in other geographic locations, each would be in its own different and unique context, so that the decision in the instant case does not control or provide precedent for the constitutionality of any other monument or display. Contrary to the petitioners' assertion that the instant case will be used by many state and local jurisdictions "as [a] basis for unwarranted intrusions on the United States Constitution" (Pet. at 8), no identical or even similar factual situation is

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[11] In the course of this litigation petitioners have repeatedly argued for a "rule of independent review" that would allow the trial court's factual findings to be disregarded, citing in particular (and taking out of context) a statement from Justice O'Connor's concurrence in *Lynch*. The issue was extensively briefed by the parties; the Colorado Supreme Court was unpersuaded by the petitioners' arguments and instead utilized customary standards of appellate review.

likely to arise. The factual and legal questions presented to and decided by the Colorado Supreme Court and their importance as precedent are not of the kind that has any effect beyond the four corners of the subject decision. This Court should eschew granting certiorari in such circumstances.

CONCLUSION

The decision of the Colorado Supreme Court in this case does not conflict with the settled law of this Court. The Colorado Supreme Court applied the controlling case law of this Court in a proper and unremarkable fashion. Accordingly, the Petition for Writ of Certiorari should be denied.

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